

12VAC30-40-10. General conditions of eligibility

Each individual covered under the plan:

1. Is financially eligible (using the methods and standards described in Parts II and III of this chapter) to receive services.

2. Meets the applicable nonfinancial eligibility conditions.

a. For the categorically needy:

(i) Except as specified under items (ii) and (iii) below, for AFDC-related individuals, meets the nonfinancial eligibility conditions of the AFDC program.

(ii) For SSI-related individuals, meets the nonfinancial criteria of the SSI program or more restrictive SSI-related categorically needy criteria.

(iii) For financially eligible pregnant women, infants or children covered under §1902(a)(10)(A)(i)(IV), 1902(a)(10)(A)(i)(VI), 1902(a)(10)(A)(i)(VII), and 1902(a)(10)(A)(ii)(IX) of the Act, meets the nonfinancial criteria of §1902(l) of the Act.

(iv) For financially eligible aged and disabled individuals covered under §1902(a)(10)(A)(ii)(X) of the Act, meets the nonfinancial criteria of §1902(m) of the Act.

b. For the medically needy, meets the nonfinancial eligibility conditions of 42 CFR 435.

c. For financially eligible qualified Medicare beneficiaries covered under §1902(a)(10)(E)(i) of the Act, meets the nonfinancial criteria of §1905(p) of the Act.

d. For financially eligible qualified disabled and working individuals covered under §1902(a)(10)(E)(ii) of the Act, meets the nonfinancial criteria of §1905(s).

3. Is residing in the United States and:

a. Is a citizen; or

b. Is a qualified alien as defined under Public Law 104-193 who arrived in the United States prior to August 22, 1996;

c. Is a qualified alien as defined under Public Law 104-193 who arrived in the United States on or after August 22, 1996, and whose coverage is mandated by Public Law 104-193;

d. Is an alien who is not a qualified alien, or who is a qualified alien who arrived in the United States on or after August 22, 1996, whose coverage is not mandated by Public Law 104-193 (coverage must be restricted to certain emergency services).

4. Is a resident of the state, regardless of whether or not the individual maintains the residence permanently or maintains it a fixed address.

The state has open agreement(s).

5. Is not an inmate of a public institution. Public institutions do not include medical institutions, nursing facilities and intermediate care facilities for the mentally retarded, or publicly operated community residences that serve no more than 16 residents, or certain child care institutions.

6. Is required, as a condition of eligibility, to assign rights to medical support and to payments for medical care from any third party, to cooperate in obtaining such support and payments, and to cooperate in identifying and providing information to assist in pursuing any liable third party. The assignment of rights obtained from an applicant or recipient is effective only for services that are reimbursed by Medicaid. The requirements of 42 CFR 433.146 through 433.148 are met.

An applicant or recipient must also cooperate in establishing the paternity of any eligible child and in obtaining medical support and payments for himself or herself and any other person who is eligible for Medicaid and on whose behalf the individual can make an assignment; except that individuals described in §1902(1)(1)(A) of the Social Security Act (pregnant women and women in the post-partum period) are exempt from these requirements involving paternity and obtaining support. Any individual may be exempt from the cooperation requirements by demonstrating good cause for refusing to cooperate.

An applicant or recipient must also cooperate in identifying any third party who may be liable to pay for care that is covered under the state plan and providing information to assist in pursuing these third parties. Any individual may be exempt from the cooperation requirements by demonstrating good cause for refusing to cooperate.

7. a. Is required, as a condition of eligibility, to furnish his social security account number (or numbers, if he has more than one number) except for aliens seeking medical

assistance for the treatment of an emergency medical condition under §1903(v)(2) of the Social Security Act (§1137(f)).

b. Applicant or recipient is required, under section 1903(x) to furnish satisfactory documentary evidence of both identity and of U.S. citizenship upon signing the declaration of citizenship required by section 1137(d). Qualified Aliens signing the declaration of satisfactory immigration status required by section 1137(d) must also present and have verified documents establishing the claimed immigration status under section 1137(d). Exception: Non-Qualified aliens seeking medical assistance for the treatment of an emergency medical condition under section 1903(v)(2) as described in section 1137(f).

8. Is not required to apply for AFDC benefits under Title IV-A as a condition of applying for, or receiving Medicaid if the individual is a pregnant women, infant, or child that the state elects to cover under §1902(a)(10)(A)(i)(IV) and 1902(a)(10)(A)(ii)(IX) of the Act.

9. Is not required, as an individual child or pregnant woman, to meet requirements under §402(a)(43) of the Act to be in certain living arrangements. (Prior to terminating AFDC individuals who do not meet such requirements under a state's AFDC plan, the agency determines if they are otherwise eligible under the state's Medicaid plan.)

10. Is required to apply for enrollment in an employer-based cost-effective group health plan (as determined by the state agency), if such plan is available to the individual.

Enrollment is a condition of eligibility except for the individual who is unable to enroll on his own behalf (failure of a parent to enroll a child does not affect a child's eligibility).

11. (RESERVED)

12. Is required, as a condition of eligibility for Medicaid payment of long-term care services, to disclose at the time of application for or renewal of Medicaid eligibility, a description of any interest the individual or his spouse has in an annuity (or similar financial instrument as may be specified by the Secretary of Health and Human Services).

By virtue of the provision of medical assistance, the state shall become a remainder beneficiary for all annuities purchased on or after February 8, 2006.

13. Is ineligible for Medicaid payment of nursing facility or other long-term care services if the individual's equity interest in his home exceeds \$500,000. This dollar amount shall be increased beginning with 2011 from year to year based on the percentage increase in the Consumer Price Index for all Urban Consumers rounded to the nearest \$1,000.

This provision shall not apply if the individual's spouse, or the individual's child who is under age 21, or is disabled as defined in Section 1614 of the Social Security Act, is lawfully residing in the individual's home.

CERTIFIED: I hereby certify that these regulations are full, true, and correctly dated.

Date

Patrick W. Finnerty, Director
Dept. of Medical Assistance Service

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12VAC30-40-290. More liberal methods of treating resources under §1902(r)(2) of the Act: §1902(f) states.

A. Resources to meet burial expenses. Resources set aside to meet the burial expenses of an applicant/recipient or that individual's spouse are excluded from countable assets. In determining eligibility for benefits for individuals, disregarded from countable resources is an amount not in excess of \$3,500 for the individual and an amount not in excess of \$3,500 for his spouse when such resources have been set aside to meet the burial expenses of the individual or his spouse. The amount disregarded shall be reduced by:

1. The face value of life insurance on the life of an individual owned by the individual or his spouse if the cash surrender value of such policies has been excluded from countable resources; and
2. The amount of any other revocable or irrevocable trust, contract, or other arrangement specifically designated for the purpose of meeting the individual's or his spouse's burial expenses.

B. Cemetery plots. Cemetery plots are not counted as resources regardless of the number owned.

C. Life rights. Life-rights to real property are not counted as a resource. The purchase of a life right in another individual's home is subject to transfer of asset rules. See 12VAC30-40-300.

D. Reasonable effort to sell.

1. For purposes of this section, "current market value" is defined as the current tax assessed value. If the property is listed by a realtor, then the realtor may list it at an amount higher than the tax assessed value. In no event, however, shall the realtor's list price exceed 150% of the assessed value.

2. A reasonable effort to sell is considered to have been made:

a. As of the date the property becomes subject to a realtor's listing agreement if:

(1) It is listed at a price at current market value; and

(2) The listing realtor verifies that it is unlikely to sell within 90 days of listing given the particular circumstances involved (e.g., owner's fractional interest; zoning restrictions; poor topography; absence of road frontage or access; absence of improvements; clouds on title, right of way or easement; local market conditions); or

b. When at least two realtors refuse to list the property. The reason for refusal must be that the property is unsaleable at current market value. Other reasons for refusal are not sufficient; or

c. When the applicant has personally advertised his property at or below current market value for 90 days by use of a "Sale By Owner" sign located on the property and by other reasonable efforts, such as newspaper advertisements, or reasonable inquiries with all adjoining landowners or other potential interested purchasers.

3. Notwithstanding the fact that the recipient made a reasonable effort to sell the property and failed to sell it, and although the recipient has become eligible, the recipient must make a continuing reasonable effort to sell by:

a. Repeatedly renewing any initial listing agreement until the property is sold. If the list price was initially higher than the tax-assessed value, the listed sales price must be reduced after 12 months to no more than 100% of the tax-assessed value.

b. In the case where at least two realtors have refused to list the property, the recipient must personally try to sell the property by efforts described in subdivision 2 c of this subsection for 12 months.

c. In the case of a recipient who has personally advertised his property for a year without success (the newspaper advertisements and "for sale" sign do not have to be continuous; these efforts must be done for at least 90 days within a 12-month period), the recipient must then:

(1) Subject his property to a realtor's listing agreement at price or below current market value; or

(2) Meet the requirements of subdivision 2 b of this subsection which are that the recipient must try to list the property and at least two realtors refuse to list it because it is unsaleable at current market value; other reasons for refusal to list are not sufficient.

4. If the recipient has made a continuing effort to sell the property for 12 months, then the recipient may sell the property between 75% and 100% of its tax assessed value and such

sale shall not result in disqualification under the transfer of property rules. If the recipient requests to sell his property at less than 75% of assessed value, he must submit documentation from the listing realtor, or knowledgeable source if the property is not listed with a realtor, that the requested sale price is the best price the recipient can expect to receive for the property at this time. Sale at such a documented price shall not result in disqualification under the transfer of property rules. The proceeds of the sale will be counted as a resource in determining continuing eligibility.

5. Once the applicant has demonstrated that his property is unsaleable by following the procedures in subdivision 2 of this subsection, the property is disregarded in determining eligibility starting the first day of the month in which the most recent application was filed, or up to three months prior to this month of application if retroactive coverage is requested and the applicant met all other eligibility requirements in the period. A recipient must continue his reasonable efforts to sell the property as required in subdivision 3 of this subsection.

E. Automobiles. Ownership of one motor vehicle does not affect eligibility. If more than one vehicle is owned, the individual's equity in the least valuable vehicle or vehicles must be counted. The value of the vehicles is the wholesale value listed in the National Automobile Dealers Official Used Car Guide (NADA) Book, Eastern Edition (update monthly). In the event the vehicle is not listed, the value assessed by the locality for tax purposes may be used. The value of the additional motor vehicles is to be counted in relation to the amount of assets that could be liquidated that may be retained.

F. Life, retirement, and other related types of insurance policies. Life, retirement, and other related types of insurance policies with face values totaling \$1,500 or less on any one person 21 years old and over are not considered resources. When the face values of such policies of any one person exceeds \$1,500, the cash surrender value of the policies is counted as a resource.

G. Resource exemption for Aid to Dependent Children categorically and medically needy (the Act §§1902(a)(10)(A)(i)(III), (IV), (VI), (VII); §§1902(a)(10)(A)(ii)(VIII), (IX); §1902(a)(10)(C)(i)(III)). For ADC-related cases, both categorically and medically needy, any individual or family applying for or receiving assistance may have or establish one interest-bearing savings or investment account per assistance unit not to exceed \$5,000 if the applicant, applicants, recipient or recipients designate that the account is reserved for purposes related to self-sufficiency. Any funds deposited in the account shall be exempt when determining eligibility for medical assistance for so long as the funds and interest remain on deposit in the account. Any amounts withdrawn and used for purposes related to self-sufficiency shall be exempt. For purposes of this section, purposes related to self-sufficiency shall include, but are not limited to, (i) paying for tuition, books, and incidental expenses at any elementary, secondary, or vocational school, or any college or university; (ii) for making down payment on a primary residence; or (iii) for establishment of a commercial operation that is owned by a member of the medical assistance unit.

H. Disregard of resources. The Commonwealth of Virginia will disregard all resources for qualified children covered under §§1902(a)(10)(A)(i)(I), 1902(a)(10)(A)(i)(III), 1902(a)(10)(A)(ii)(VIII), and 1905(n) of the Social Security Act.

I. Household goods and personal effects. The Commonwealth of Virginia will disregard the value of household goods and personal effects. Household goods are items of personal property customarily found in the home and used in connection with the maintenance, use and occupancy of the premises as a home. Examples of household goods are furniture, appliances, televisions, carpets, cooking and eating utensils and dishes. Personal effects are items of personal property that are worn or carried by an individual or that have an intimate relation to the individual. Examples of personal property include clothing, jewelry, personal care items, prosthetic devices and educational or recreational items such as books, musical instruments, or hobby materials.

J. Determining eligibility based on resources. When determining Medicaid eligibility, an individual shall be eligible in a month if his countable resources were at or below the resource standard on any day of such month.

CERTIFIED: I hereby certify that these regulations are full, true, and correctly dated.

Date

Patrick W. Finnerty, Director
Dept. of Medical Assistance Service

12VAC30-40-300. Transfer of resources.

The agency provides for the denial of eligibility by reason of disposal of resources for less than fair market value. This section includes procedures applicable to all transfers of resources.

A. Except as noted below, the criteria for determining the period of ineligibility are the same as criteria specified in §1613(c) of the Social Security Act (Act): Transfer of resources other than the home of an individual who is an inpatient in a medical institution.

1. The agency uses a procedure which provides for a total period of ineligibility greater than 24 months for individuals who have transferred resources for less than fair market value when the uncompensated value of disposed of resources exceeds \$12,000.00. This period bears a reasonable relationship to the uncompensated value of the transfer. The computation of the period and the reasonable relationship of this period to the uncompensated value is described as follows:

This transfer of resources rule includes the transfer of the former residence of an inpatient in a medical institution.

2. The agency has provisions for waiver of denial of eligibility in any instance where the State determines that a denial would work an undue hardship.

B. Other than those procedures specified elsewhere in this section, the procedures for implementing denial of eligibility by reason of disposal of resources for less than fair market value are as follows:

1. If the uncompensated value of the transfer is \$12,000 or less: the individual is ineligible for two years from the date of the transfer.
2. If the uncompensated value of the transfer is more than \$12,000: the individual is ineligible two years, plus an additional 2 months for every \$1,000 or part thereof of uncompensated value over \$12,000, from the date of transfer.

C. Property Transfer - An applicant for or recipient of Medicaid is ineligible for Medicaid if he transferred or otherwise disposed of his legal equitable interest in real or personal property for less than fair market value. Transfer of property precludes eligibility for two years from the date of the transfer if the uncompensated value of the property was \$12,000 or less. If the uncompensated value was over \$12,000 an additional two months of ineligibility will be added for each \$1,000 of additional uncompensated value (see following Table). "Uncompensated value" means the current market value of the property, or equity in the property, at the time it was transferred, less the amount of compensation (money, goods, service, et cetera) received for the property.

Exceptions to this provision are:

1. When the transfer was not made with the intent of establishing or retaining eligibility for Medicaid or SSI. Any transfer shall be presumed to have been for the purposes of

establishing or retaining eligibility for Medicaid or SSI unless the applicant/recipient furnishes convincing evidence to establish that the transfer was exclusively for some other purpose.

a. The applicant/recipient has the burden of establishing, by objective evidence of facts rather than statement of subjective intent, that the transfer was exclusively for another purpose.

b. Such evidence shall include evidence that adequate resources were available at the time of the transfer for the applicant/recipient's support and medical care including nursing home care, considering his or her age, state of health, and life expectancy.

c. The declaration of another purpose shall not be sufficient to overcome this presumption of intent.

d. The establishment of the fact that the applicant/recipient did not have specific knowledge of Medicaid or SSI eligibility policy is not sufficient to overcome the presumption of intent.

2. Retention of the property would have no effect on eligibility unless the property is a residence of an individual in a nursing home for a temporary period.

3. When transfer of the property resulted in compensation (in money, goods, or services) to the applicant/recipient which approximated the equity value of the property.

4. When the receiver of the property has made payment on the cost of the applicant/recipient's medical care which approximates the equity value of the property.
5. When the property owner has been a victim of another person's actions, except those of a legal guardian, committee, or power-of-attorney, who obtained or disposed of the property without the applicant/recipient's full understanding of the action.
6. When prior to October 1, 1982, the Medicaid applicant transferred a prepaid burial account (plan) which was valued at less than \$1,500.00 for the purpose of retaining eligibility for SSI, and was found ineligible for Medicaid solely for that reason. The applicant, after reapplying, may be eligible regardless of the earlier transfer of a prepaid burial account if the applicant currently meets all other eligibility criteria.
7. When the property is transferred into an irrevocable trust designated solely for the burial of the transferor or his spouse. The amount transferred into the irrevocable burial trust, together with the face value of life insurance and any other irrevocable funeral arrangements, shall not exceed \$2,000 prior to July 1, 1988, and shall not exceed \$2,500 after July 1, 1988.

PERIOD OF INELIGIBILITY DUE TO

TRANSFER OF PROPERTY

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Uncompensated Value of Property Period of Ineligibility

0	\$12,000.00	24 months
12,000.01	\$13,000.00	26 months
13,000.01	\$14,000.00	28 months
14,000.01	\$15,000.00	30 months
15,000.01	\$16,000.00	32 months

For each additional \$1,000.00 add two months of ineligibility.

D. The preceding policy applies to eligibility determinations on and before June 30, 1988.

The following policy applies to eligibility determinations on and after July 1, 1988.

1. The State plan provides for a period of ineligibility for nursing facility services, equivalent services in a medical institution, and home and community-based services in the case of an institutionalized individual (as defined in paragraph (3) of §1917(c) who, disposed of resources for less than fair market value, at any time during or after the 30-month period immediately before the date the individual becomes an institutionalized individual (if the individual is entitled to medical assistance under the State plan on that date) or, if the individual is not entitled on the date of institutionalization, the date the individual applies for assistance while an institutionalized individual.

a. 30 months, or

b. The total uncompensated value of the resources so transferred, divided by the average cost, to a private patient at the time of application, of nursing facility services in the State.

2. An individual shall not be ineligible for medical assistance by reason of paragraph 1. to the extent that -

a. The resources transferred were a home and title to the home was transferred to -

(1) The spouse of such individual;

(2) A child of such individual who is under age 21, or is blind or disabled as defined in §1614 of the Social Security Act;

(3) A sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or

(4) A son or daughter of such individual (other than a child described in clause (2)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual; and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

b. The resources were transferred to (or to another for sole benefit of) the community spouse as defined in §1924(h)(2) of the Social Security Act, or to the individual's child

who is under age 21, or is blind or disabled as defined in §1614 of the Social Security Act.

c. A satisfactory showing is made to the State (in accordance with any regulations promulgated by the Secretary of United States Department of Health and Human Services) that

(1) The individual intended to dispose of the resources either at fair market value, or for other valuable consideration. To show intent to receive adequate compensation, the individual must provide objective evidence that:

(a) For real property, the individual made an initial and continuing effort to sell the property according to the "reasonable effort to sell" provisions of the Virginia Medicaid State Plan;

(b) For real or personal property, the individual made a legally binding contract that provided for receipt of adequate compensation in a specified form (goods, services, money, etc.) in exchange for the transferred property;

(c) An irrevocable burial trust of \$2,500 or less was established on or after July 1, 1988 as compensation for the transferred money;

(d) An irrevocable burial trust over \$2500 was established on or after July 1, 1988, and the individual provides objective evidence to show that all funds in the trust are for identifiable funeral services; or

(2) The resources were transferred exclusively for a purpose other than to qualify for medical assistance; the individual must provide objective evidence that the transfer was exclusively for another purpose and the reason for the transfer did not include possible or future Medicaid eligibility; or

(3) Consistent with 1917(c)(2)(D), an institutionalized spouse who (or whose spouse) transferred resources for less than fair market value shall not be found ineligible for nursing facility service, for a level of care in a medical institution equivalent to that of nursing facility services, or for home and community-based services where the state determines that denial of eligibility would work an undue hardship under the provision of §1917(c)(2)(D) of the Social Security Act.

3. In this section, the term "institutionalized individual" means an individual who is an inpatient in a nursing facility, or who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1902 (a)(10)(A)(ii)(VI).

4. In this section, the individual's home is defined as the house and lot used as the principal residence and all contiguous property up to \$5,000.00.

E. Transfers And Trusts After August 10, 1993. The following policy applies to medical assistance provided for services furnished on or after October 1, 1993, with respect to assets disposed of after August 10, 1993, and before February 8, 2006. It also applies and with respect to trusts established after August 10, 1993.

1. Definitions.

"Assets" means, with respect to an individual, all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or the individual's spouse is entitled to but does not receive because of action:

a. By the individual or the individual's spouse,

b. By a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse, or

c. By any person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

"Income" has the meaning given such term in section 1612 of the Social Security Act.

"Institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility or who is described in section 1902(a)(10)(A)(ii)(VI) of the Social Security Act.

"Resources" has the meaning given such term in section 1613 of the Social Security Act, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

2. Transfer of Assets Rule. An institutionalized individual who disposes of, or whose spouse disposes of, assets for less than fair market value on or after the look-back date

specified in subdivision 2.b. shall be ineligible for nursing facility services, a level of care in any institution equivalent to that of nursing facility services and for home or community-based services furnished under a waiver granted under subsection (c) of §1915 of the Social Security Act.

a. **Period of Ineligibility.** The ineligibility period shall begin on the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other period of ineligibility under this section. The ineligibility period shall be equal to but shall not exceed the number of months derived by dividing:

(1) The total, cumulative uncompensated value of all assets transferred as defined in E.1. on or after the look-back date specified in E.2.b by

(2) The average monthly cost to a private patient of nursing facility services in the Commonwealth at the time of application for medical assistance.

b. **Look-Back Date.** The look-back date is a date that is 36 months (or, 60 months in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to this section or Section 3,) before the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State Plan for Medical Assistance.

c. **Exceptions.** An individual shall not be ineligible for medical assistance by reason of this section to the extent that:

(1) The assets transferred were a home and title to the home was transferred to:

(a) The spouse of the individual;

(b) A child of the individual who is under age 21, or is blind or disabled as defined in section 1614 of the Social Security Act,

(c) A sibling of the individual who has an equity interest in the home and who was residing in the individual's home for a period of a least one year immediately before the date the individual becomes an institutionalized individual, or

(d) A son or daughter of the individual (other than a child described in clause (b)) who was residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who provided care to the individual which permitted the individual to reside at home rather than in an institution or facility.

(2) The assets:

(a) Were transferred to the individual's spouse or to another person for the sole benefit of the individual's spouse,

(b) Were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(c) Were transferred to the individual's child who is under age 21 or who is disabled as defined in §1614 of the Social Security Act, or to a trust (including a trust described in 3.g.) established solely for the benefit of such child, or

(d) Were transferred to a trust (including a trust described in 3.g.) established solely for the benefit of an individual under age 65 years of age who is disabled as defined in section 1614(a)(3) of the Social Security Act.

(3) A satisfactory showing is made that:

(a) The individual intended to dispose of the assets either at fair market value, or for other valuable consideration, or

(b) The assets were transferred exclusively for a purpose other than to qualify for medical assistance, or

(c) All assets transferred for less than fair market value have been returned to the individual, or

(d) The Commonwealth determines that the denial of eligibility would work an undue hardship.

d. Assets Held In Common With Another Person. In the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or other arrangement recognized under State law, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any

action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

e. Transfers by Both Spouses. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance, the Commonwealth shall apportion the period of ineligibility (or any portion of the period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State Plan.

3. For Trust(s) Created After August 10, 1993. For purposes of determining an individual's eligibility for, or amount of, medical assistance benefits, subject to 3.g., these rules shall apply.

a. Trust(s) Defined. The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the United States Secretary of Health and Human Services specifies for purposes of administration of §1917(c) or (d) of the Social Security Act.

b. Creation of Trust(s) Defined. For purposes of this subsection, an individual shall be considered to have established a trust(s) if assets of the individual were used to form all or part of the corpus of the trust(s) and if any of the following individuals established the trust(s) other than by will:

(1) The individual,

(2) The individual's spouse,

(3) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse,

(4) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

c. Proportional Interest In Trust(s). In the case of a trust(s) the corpus of which includes assets of an individual (as determined under 3.b.) and assets of any other person or persons, the provision of this section shall apply to the portion of the trust(s) attributable to the assets of the individual.

d. Trust(s) Affected. Subject to 3.g., this section shall apply without regard to:

(1) The purposes for which a trust(s) is established,

(2) Whether the trustee(s) has or exercises any discretion under the trust(s),

(3) Any restrictions on when or whether distributions may be made from the trust(s), or

(4) Any restrictions on the use of distributions from the trust(s).

e. Revocable Trust(s). In the case of a revocable trust(s),

(1) The corpus of the trust(s) shall be considered resources available to the individual,

(2) Payments from the trust(s) to or for the benefit of the individual shall be considered income of the individual, and

(3) Any other payments from the trust(s) shall be considered assets disposed of by the individual for the purposes of E.2.

f. Irrevocable Trust(s). In the case of irrevocable trust(s),

(1) If there are any circumstances under which payment from the trust(s) could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income:

(a) To or for the benefit of the individual, shall be considered income of the individual, and

(b) For any other purpose, shall be considered a transfer of assets by the individual subject to E.2., and

(2) Any portion of the trust(s) from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust(s) (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed of by the individual for purposes of E.2., and the value of the trust(s) shall be determined for purposes of such section by including the amount of any payments made from such portion of the trust(s) after such date.

g. Exceptions. This section shall not apply to any of the following trust(s):

(1) A trust(s) containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3) of the Social Security Act) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual or a court if the Commonwealth will receive all amounts remaining in the trust(s) upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under this State Plan.

(2) A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3) of the Social Security Act) that meets all of the following conditions:

(a) The trust(s) is established and managed by a non-profit association,

(b) A separate account is maintained for each beneficiary of the trust(s), but, for purposes of investment and management of funds, the trust(s) pools these accounts.

(c) Accounts in the trust(s) are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3) of the Social Security Act) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(d) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust(s), the trust(s) pays to the Commonwealth from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under this State Plan.

F. Transfers made on or after February 8, 2006. The following policy applies to medical assistance provided for services furnished on or after February 8, 2006, with respect to assets disposed of on or after February 8, 2006.

1. Definitions.

"Assets" means, with respect to an individual, all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or the individual's spouse is entitled to but does not receive because of action:

a. By the individual or the individual's spouse,

b. By a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse, or

c. By any person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

The term "assets" includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least one year after the date of the purchase. The term "assets" also includes funds used to purchase a promissory note, loan or mortgage unless such note, loan or mortgage:

a. Has a repayment term that is actuarially sound (determined in accordance with actuarial publications of the Social Security Administration),

b. Provides for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments made, and

c. Prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan or mortgage that does not satisfy the requirements of a. through c. above, the value of such note, loan or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance.

"Income" has the meaning given such term in section 1612 of the Social Security Act.

"Institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility or who is described in section 1902(a)(10)(A)(ii)(VI) of the Social Security Act.

"Resources" has the meaning given such term in section 1613 of the Social Security Act, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

2. Transfer of Assets Rule. An institutionalized individual who disposes of, or whose spouse disposes of, assets for less than fair market value on or after the look-back date specified in subdivision 2.b. shall be ineligible for nursing facility services, a level of care in any institution equivalent to that of nursing facility services and for home or community-based services furnished under a waiver granted under subsection (c) of §1915 of the Social Security Act.

a. Period of Ineligibility. The ineligibility period shall begin on the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving Medicaid-covered institutional level care based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur in any other period of ineligibility under this section. The ineligibility period shall be equal to but shall not exceed the number of months, including any fractional portion of a month, derived by dividing:

(1) The total, cumulative uncompensated value of all assets transferred as defined in F.1. on or after the look-back date specified in F.2.b by:

(2) The average monthly cost to a private patient of nursing facility services in the Commonwealth at the time of application for medical assistance.

b. Look-Back Date. The look-back date is a date that is 60 months before the first date the individual is both an institutionalized individual and has applied for medical assistance under the State Plan for Medical Assistance.

c. Exceptions. An individual shall not be ineligible for medical assistance by reason of this section to the extent that:

(1) The assets transferred were a home and title to the home was transferred to:

(a) The spouse of the individual;

(b) A child of the individual who is under age 21, or is blind or disabled as defined in section 1614 of the Social Security Act,

(c) A sibling of the individual who has an equity interest in the home and who was residing in the individual's home for a period of a least one year immediately before the date the individual becomes an institutionalized individual, or

(d) A son or daughter of the individual (other than a child described in clause (b)) who was residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who provided care to the individual which permitted the individual to reside at home rather than in an institution or facility.

(2) The assets:

(a) Were transferred to the individual's spouse or to another person for the sole benefit of the individual's spouse,

(b) Were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(c) Were transferred to the individual's child who is under age 21 or who is disabled as defined in §1614 of the Social Security Act, or to a trust (including a trust described in 3.g.) established solely for the benefit of such child, or

(d) Were transferred to a trust (including a trust described in 3.g.) established solely for the benefit of an individual under age 65 years of age who is disabled as defined in section 1614(a)(3) of the Social Security Act.

(3) A satisfactory showing is made that:

(a) The individual intended to dispose of the assets either at fair market value, or for other valuable consideration, or

(b) The assets were transferred exclusively for a purpose other than to qualify for medical assistance, or

(c) All assets transferred for less than fair market value have been returned to the individual, or

(d) The Commonwealth determines that the denial of eligibility would work an undue hardship.

d. Assets Held In Common With Another Person. In the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or other arrangement recognized under State law, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

e. Transfers by Both Spouses. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance, the Commonwealth shall apportion the period of ineligibility (or any portion of the period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State Plan.

3. Annuities: The following shall govern annuities,

a. "For purposes of this section, the purchase of an annuity by the institutionalized spouse or the community spouse will be treated as the disposal of an asset for less than fair market value unless:

1. the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant; or

2. the State is name as a remainder beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any remainder for less than fair market value.

b. The purchase of annuity by or on behalf of an annuitant who has applied for medical assistance for long-term care services will be considered a transfer of assets for less than fair market value unless:

1. the annuity is described in subsection (b)-individual retirement annuities- or (q) deemed IRAs under qualified employer plans- of section 408 of the Internal Revenue Code of 1986; or

2. purchased with the proceeds from:

a. an account or trust described in subsection (a)-individual retirement account-
(c)-accounts established by employers and certain associations of employees- or
(p)-simple retirement accounts- of section 408 of such Code;

b. a simplified employee pension (within the meaning of section 408(k) of such
Code, or;

c. a Roth IRA described in 408A of such Code, or;

3. the annuity is :

a. irrevocable and nonassignable;

b. is actuarially sound (as determined by Social Security Administration
publications); and

c. provides for payments in equal amounts during the term of the annuity
with no deferral and no balloon payments made.

CERTIFIED: I hereby certify that these regulations are full, true, and correctly dated.

Date

Patrick W. Finnerty, Director
Dept. of Medical Assistance Service

12VAC 30-40-360 Treatment of entrance fees of individuals Residing in Continuing Care Retirement Communities.

When determining eligibility for medical assistance, an individual's entrance fee in a continuing care retirement community or life care community that collects an entrance fee on admission from such individuals shall be considered a resource available to the individual to the extent that:

1. the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;
2. the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and,
3. the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

CERTIFIED: I hereby certify that these regulations are full, true, and correctly dated.

Date

Patrick W. Finnerty, Director
Dept. of Medical Assistance Service

12VAC30-110-710. Undue Hardship--Transfer of resources.

Undue Hardship—Undue hardship exists when the Department determines that the application of the transfer of assets provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered or would deprive the individual of food, clothing, shelter or other necessities of life.

A. When determining the eligibility of an individual who has transferred resources without receiving adequate compensation, the individual must be notified applicant, in cases where the state determines that denial of eligibility would work an undue hardship:

1. That an undue hardship can be claimed, the process for seeking an exception from the transfer of assets provisions and the time frame making determinations of whether an undue hardship exists;

1.a. The individual must provide That written documentation must be provided to substantiate the circumstances of the transfer and the claim of undue hardship.

2.b. The individual must provide That written documentation must be provided to document that the resources transferred without adequate compensation cannot be recovered.

3.c. The individual must provide That written documentation must to clearly substantiate the immediate adverse impact of the denial of Medicaid coverage of nursing facility long-term care services due to the uncompensated transfer and would result in the individual

being removed from the institution or unable to receive life sustaining medical care, food, clothing shelter or other necessities of life.

~~4. Undue hardship means denial of Medicaid eligibility would result in the individual being removed from the institution and unable to purchase life sustaining medical care.~~

2. That a denial of a claim for undue hardship may be appealed in accordance with the provisions of 12VAC 30-110.

B. A hardship waiver may be requested by:

1. The applicant for, or recipient of, medical assistance services;

2. The applicant or recipient's spouse, legal guardian, power-of-attorney or person who has been authorized in writing by the applicant or recipient to act on his behalf; or,

3. With the written consent of the individual or his personal representative, the nursing facility in which the institutionalized individual is residing.

CERTIFIED: I hereby certify that these regulations are full, true, and correctly dated.

Date

Patrick W. Finnerty, Director
Dept. of Medical Assistance Service

12VAC30-110-960. Community spouse income allowance.

A. Unless the exceptions in subsections B and C of this section apply, a community spouse monthly income allowance shall be deducted from the monthly income of the institutionalized spouse. The community spouse monthly income allowance shall be the amount by which the greater of:

1. The community spouse monthly maintenance needs standard plus the excess shelter allowance, if any; or

2. An amount determined necessary by a department hearing officer because of exceptional circumstances resulting in extreme financial duress;

exceeds the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

B. A community spouse monthly income allowance shall not be deducted from the income of the institutionalized spouse when the institutionalized spouse does not actually make an income allowance available to the community spouse.

C. If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

D. Applicaton of “Income First” Rule to Revision of Community Spouse Resource

Allowance. All income of the institutionalized spouse that could be made available to a community spouse, in accordance with the calculation of the community spouse monthly income allowance, must be made available before an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse is allocated to the community spouse.

CERTIFIED: I hereby certify that these regulations are full, true, and correctly dated.

Date

Patrick W. Finnerty, Director
Dept. of Medical Assistance Service